per annum from the date of the writ to the date of payment and costs.

Judgment for the plaintiffs.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

MAHINDER SINGH v. BEH YOK NAM

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) March 2, 1967]

[Penang — Federal Court Civil Appeal No. X.41 of 1966]

Moneylenders — Borrower acknowledging receipt of true copy of promissory note — Acknowledgement endorsed at the back of original — Subsequent denial by borrower — Whether borrower estopped — Whether there was sufficient compliance — Moneylenders Ordinance, 1951, s. 16(1).

This was an appeal against the dismissal of the High Court of an action by a moneylender for principal and interest on a promissory note. The defendant denied an allegation by the plaintiff that he delivered an authenticated copy of the promissory note to the defendant before the money was advanced.

At the trial an advocate and solicitor gave evidence to the effect that the promissory note was prepared in duplicate, that both copies were signed by the lender and the borrower and that the note was attested by him, the attestation clause appearing on both copies. He further deposed that the borrower acknowledged receipt of copy on the reverse side of the original note.

The plaintiff gave evidence that before the defendant was given the copy he had compared it with the original and satisfied himself that they were the same. The defendant admitted having executed the promissory note and having acknowledged receipt of the copy but said that he in fact never received the copy.

The trial judge decided to hear as a preliminary issue the question whether there had been delivered to the defendant before the money was lent a copy of the promissory note authenticated by the lender and held that there was no evidence from which he could infer that the copy which was alleged to have been delivered to the defendant had been authenticated in the manner required by section 16(1) of the Moneylenders Ordinance, 1951.

Held: (1) as the borrower had signed a receipt for a true copy of the promissory note, which he had duly executed, he was estopped from denying that a true copy of the note was given to him;

(2) what the borrower was given in this case was not a mere copy of the promissory note authenticated by the lender but a duplicate original of the promissory note which was something more than what section 16(1) of the Moneylenders Ordinance required.

Cases referred to:—

(1) *Subramanian* v. *Konar* [1962] M.L.J. 385, 386.

(2) *Kartar Singh* v. *Mahinder Singh* [1959] M.L.J. 248.

(3) *Ang Khye Pang* v. *Chop Ban Aik* [1939] M.L.J. 282.

FEDERAL COURT.

A. Jeyadeva for the appellant.

Goh Eng Kee for the respondent.

In the court below the following judgment was delivered by,

Ong Hock Sim J.: This is an action by the plaintiff, a licensed moneylender, to recover upon an on demand promissiry note executed by the defendant in his favour on the 31st May, 1958 in respect of a loan of $2,000 with interest at the rate of 18 per centum per annum. Paragraph 5 of the statement of claim recited that "an authenticated copy of the said promissory note was delivered to the defendant before the money was advanced to him." This the defendant specifically denied in paragraph 3 of his statement of defence and I decided that this should be tried as a preliminary issue, namely whether there had been compliance with the provisions of subsection (1) of section 16 of the Moneylenders Ordinance 1951.

The solicitor who attested the promissory note testified that the defendant was given a copy of Exhibit P.1., the promissory note which had been signed by the parties thereto. He further stated that the defendant acknowledged the receipt of a copy thereof (which had been similarly executed by the parties) by signing below the words "Received a true copy of this note or memorandum" which had been typed out on the reverse side of the promissory note. The plaintiff did not add much further to this bit of evidence as, when put to him that there was no authenticated copy, he said "I gave you after comparing the copy with the original and satisfying myself they were the same". The defendant not only maintained that he did not receive an authenticated copy but went so far as to say that he did not even receive a duplicate of P.1. It is not material at this stage to draw any conclusion as to the credibility of the defendant. What I have at this stage to decide is whether an authenticated copy of P.1 had been given to the defendant. Counsel for the plaintiff urged that since defendant had not produced his copy to show it had not been authenticated as claimed by him, then I should presume against him. In support he referred to the case of *Subramaniam* v. *Konar* [1] where Thomson C.J. accepted evidence that the copy which was handed to the borrower was authenticated by reason of an admission "I also acknowledge that before receiving the said sum and before giving this promissory note to the lender a copy thereof . . . authenticated by the lender was delivered and received by me." This was reinforced by the evidence of the moneylender that he had signed twice on the pink copy, while signing only once on the white copy, and pointed to that being some form of authentication.

There is no dispute that the burden of proving that an authenticated copy of the note was handed lay upon the moneylender. Whether or not I believe the defendant that he did not receive even a duplicate copy, I have now to decide whether an authenticated copy of P.1 was so delivered by the plaintiff to the defendant.

On the evidence before me, I am unable to infer that there had been any separate and additional act of authentication and I would quote from the judgment of Good J. in *Kartar Singh* v. *Mahinder Singh* [2]:—

"The onus is upon the plaintiff to prove that the requirements of the Ordinance have been complied with, and there is no evidence of authentication by the respondent in this appeal of the copy of the memorandum delivered to the appellant. In this connection, he says: 'A memorandum was prepared as required by law (Exh. P.1) . . . I gave him a copy of it. . . . The defendant acknowledged receipt of the copy of the memorandum by putting his signature on the memorandum. . . . One copy of the memorandum was given to the defendant.' It is not necessary that a copy of the form of authentication on the copy of the memorandum should be placed on the memorandum itself, but there must be evidence that the separate and additional act of authentication was done by the lender in relation to the copy of the memorandum. In the absence of any such evidence the respondent was precluded from enforcing the contract. In *Ang Khye Pang's* case, *supra*, Terrell J.A. said: 'In the case before the court, no authentication has been signed by the lender and accordingly the contract is not enforceable.' And Poyser C J. (F.M.S.) in a concurring judgment said: 'The authentication clause of "B$_1$" was not signed by the lender, nor was there anything on the document in the nature of an authentication by the lender. The lender only signed "B$_1$" at the foot of the copy of the promissory note. The trial judge held that as "B".'

"Contained an exact copy of the contract and bore on its face the signature of both plaintiff and defendant, it was a substantial and adequate compliance with the requirements of section 4, so far as authentication was concerned."

I do not agree; the provisions of the Moneylenders Ordinance must be strictly complied with. There are a number of authorities, both English and local, to this effect, and in this case such provisions were not strictly complied with."

The facts of this case seem to be on all fours with those in *Ang Khye Pang's* namely, that what was in fact done was execution of the note in duplicate. There was no evidence from which to infer authentication, as was admittedly present in *Subramaniam's* case *supra*, and I accordingly dismissed the claim with costs.

The plaintiff appealed to the Federal Court. The judgment of the Federal Court are as follows.

Pike C.J. (Borneo): This appeal arises out of the dismissal by the High Court of an action by a moneylender for recovery of money lent and interest thereon.

The plaintiff-appellant claimed the sum of $3,275 as principal and interest due on a promissory note for $2,000 dated 31st May, 1958. The plaintiff's statement of claim set out particulars of the interest due and the interest alleged to have been paid by the defendant and claimed the principal sum together with the balance due for interest. He also averred in paragraph 5 of the statement of claim that an authenticated copy of the promissory note was delivered to the defendant before the money was advanced.

The defendant-respondent by his defence denied owing the plaintiff the amount claimed and set out particulars of payments made by him showing that he owed a balance of only $1,195. The defendant-respondent also specifically denied that an authenticated copy of the promissory note was delivered to him before the money was advanced.

The learned trial judge decided to hear as a preliminary issue the question whether there had been delivered to the defendant before the money was lent a copy of the promissory note authenticated by the lender.

Evidence was given by the plaintiff and his witness, Mr. Peh Tchin Oon, an advocate and solictior practising in Penang.

Mr. Peh (P.W.1) stated that the promissory note on which the claim is based (Ex.P.1) was attested by him, that both lender and borrower appeared before him and that the note had been prepared in duplicate and that the attestation clause, which had been typed in his office, appeared on both copies. He further says that both copies were signed by the lender and the borrower and both were attested by him and that he gave a copy to the borrower and that the money was then paid. He says that the borrower acknowledged receipt of a copy on the reverse side of the original note by signing above the words "Received a true copy of this Note or Memorandum" and these words do in fact appear over what appears to be the borrower's signature on Ex.P.1.

The plaintiff then gave evidence that he lent the defendant $2,000 on the 31st May, 1958, and that he and the defendant signed both the original and the copy of the promissory note and that the copy was given to the defendant and the money was then lent. He further says that before the defendant was given the copy he had compared it with the original and satisfied himself that they were the same.

It is regrettable that the evidence of P.W.1 and P.W.2 was not more detailed and specific but it must be remembered that some eight years had elapsed since the loan transaction and that both these witnesses must have effected many similar transactions in that space of time so that the details of a particular transaction would hardly stand out in their memory.

The defendant gave evidence that he executed P.1 on the front and also signed on the reverse but he says that although he signed on the back of P.1 that he received a true copy of the note he did not receive it. In cross examination it was put to him that he did receive a copy but he again denied it, and when it was also put to him that the copy was authenticated he persisted only in saying he received no copy.

In my opinion the defendant is estopped

from denying that he received a true copy. Having admitted signing a receipt for a true copy on the back of the promissory note which he admits he executed he cannot now be heard to deny that a true copy of the note was given to him. Even to the uninitiated in the science of handwriting the signature below the receipt on the back appears to be the same hand as that which signed the promissory note as borrower. And that so called true copy was in fact a duplicate original not a mere copy.

On this evidence the learned judge held that there was no evidence from which to infer that the copy which was alleged to have been delivered to the defendant had been authenticated in the manner required by section 16(1) of the Moneylenders Ordinance, 1951. The learned judge considered the case to be on all fours with the facts in *Ang Khye Pang* v. *Chop Ban Aik.*[3]

It seems to me, however, that the learned judge failed to appreciate that what is here alleged is that what the borrower was given was not a mere copy of the note or memorandum of the contract but a duplicate original note. This it seems to me is the important respect in which this case differs from the *Ang Khye Pang* case and the other cases which have followed it.

If the evidence for the plaintiff is accepted what was delivered to the borrower was something more than section 16(1) of the Ordinance requires. The borrower was given an original document made by himself and bearing his own signature upon it and not a mere copy authenticated by the lender. This original document was executed by the borrower in the presence of P.W.1 who is an advocate and solicitor and as such an officer of the court. The word "authenticate" means "to establish the genuineness of". Surely by placing his signature on the document in the presence of the person who attested the borrower's signature the lender has established the genuineness of the document beyond peradventure.

Can it seriously be argued that in a case such as this where the promissory note was executed in duplicate, if the lender had delivered the original note, i.e. the executed top copy, and retained the executed bottom copy, he could not enforce the contract because what had been given to the borrower was not a copy authenticated by the lender but the original. And to take it logically a step further if the borrower had been given the executed top copy on which the lender had written some words stating it to be authenticated by him and had then signed his name below those words that that was not a compliance with section 16(1) because what the borrower got was the original and not a copy.

I find myself unable to accept such reasoning and I am of opinion that where, as is alleged in this case, the borrower has been given a duplicate original document the requirements of section 16(1) would be sufficiently complied with and clearly the mischief which the law was designed to prevent would be prevented. In my opinion the addition of the words of authentication by one of the signatories could add nothing to the authenticity of the document. It would be as sensible to require that an original document be certified by a party to it to be a true copy of itself — such a certificate would be valueless and false.

In my opinion, therefore, the appeal should be allowed and the case remitted to the High Court for re-trial. The costs of the trial of this issue and of this appeal to be costs in the cause.

Azmi C.J. (Malaya) and **Yong J.** concurred.

Appeal allowed.

Solicitors: *Jayadeva, Zahir & Ismi; Goh Eng Kee & Co.*

RATNA AMMAL v. TAN CHOW SOO

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) March 2, 1967]

[Penang — Federal Court Civil Appeal No. X.55 of 1966]

Bills of exchange — Cheque — Plea that cheque was given for illegal consideration — Barter trade — Bills of Exchange Act, 1882, s. 30(2).

Evidence — Standard of proof required where fraud or conspiracy is alleged — Evidence Ordinance, 1950, s. 10.

This was an appeal by the plaintiff against the decision of the High Court, reported in [1966] 2 M.L.J. 294.

The plaintiff brought an action to recover from the defendant as drawer of a cash cheque for $50,000 which she alleged the defendant gave in exchange for several loans made by her to him. The defendant admitted having drawn the cheque but pleaded that it was given for an illegal consideration. He alleged that the plaintiff's son, who was employed in the Foreign Exchange Control Department, was to assist in getting licences for the export of goods to Indonesia and in return the defendant gave the cheque as part of the payment to be shared by a syndicate consisting of the plaintiff's son, the staff of the Indonesian consulate in Penang and an intermediary.

The trial judge held that on the evidence the defendant had proved that the cheque was given to the plaintiff's son and that at the time it was given it was tainted with illegality and therefore void and as the plaintiff had failed to prove that subsequent to the illegality, value had been given in good faith for the cheque, the claim must be dismissed. The plaintiff appealed.

Held: in the circumstances of the case there was no evidence to conclude that the defendant had proved the cheque had been given for an illegal consideration. Therefore the appeal must be allowed.

Cases referred to:—

(1) *Bater* v. *Bater* [1951] P. 35.

(2) *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173.